

Symposium - Environmental Federalism: Historical Roots and Contemporary Models

Robert V. Percival

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mlr>



Part of the [Environmental Law Commons](#)

Recommended Citation

R. V. Percival, *Symposium - Environmental Federalism: Historical Roots and Contemporary Models*, 54 Md. L. Rev. 1141 (1995)
Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol54/iss4/3>

This Conference is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

MARYLAND LAW REVIEW

VOLUME 54

1995

NUMBER 4

© Copyright Maryland Law Review, Inc. 1995

Symposium

ENVIRONMENTAL FEDERALISM

ENVIRONMENTAL FEDERALISM: HISTORICAL ROOTS AND CONTEMPORARY MODELS

ROBERT V. PERCIVAL*

Federal-state relations have been a chronic source of political conflict since the founding of our republic. As vast changes occurred in the economic and social life of the country, the flashpoints of this conflict have shifted. During the last two centuries a Civil War, the New Deal, and the post-World War II rise of the modern regulatory state have profoundly affected the balance of power between federal and state governments. In recent years, national environmental policy has surged to the forefront of contemporary federalism debates due to the growth of federal environmental regulation. This Symposium explores how responsibilities for environmental protection policy have been, and should be, allocated between federal, state, and local governments; issues we call "environmental federalism."¹

The Symposium takes place at a time of remarkable ferment over federalism. State and local officials have mobilized intense political

* Professor of Law, Robert Stanton Scholar and Director, Environmental Law Program, University of Maryland School of Law.

1. The articles in this issue of the *Maryland Law Review* were first presented at the Ward, Kershaw and Minton Environmental Symposium at the University of Maryland School of Law on April 7, 1995. I would like to express my appreciation to all the contributors to this Symposium for their thoughtful and provocative work. I would also like to thank Ward, Kershaw and Minton, P.A. for the financial support that made the Symposium possible.

opposition to federal mandates.² A sharply divided Supreme Court is rethinking the very constitutional foundations of our federal system.³ The new Congress already has enacted legislation restricting its ability to impose unfunded mandates on state and local governments; other bills to return power to the states also are under consideration.⁴ Several legislatures have called for a "Conference of States" to initiate constitutional amendments that could shift even greater power to state governments.⁵

Regardless of the outcome of these initiatives, the landscape of federalism appears to be shifting toward the states after decades of moving in the opposite direction. This could have profound implications for national environmental policy. Yet, as the articles in this Symposium demonstrate, environmental federalism issues are far more complicated than is reflected in the popular rhetoric about reducing the size of government and returning power to the states. Federal environmental policy has long been sensitive to federalism concerns. Congress mandated national environmental standards only after a long history of failed efforts to encourage states to act on their own. Even though they often require states to meet minimum national standards, the federal environmental laws generally have been designed to avoid preemption of state law.

This Article begins by introducing the issues addressed in the other articles in this Symposium. It then reviews the historical evolution of federal environmental protection policy and notes that the recent avalanche of federal environmental legislation occurred only after a history of unsuccessful federal efforts to encourage states to address burgeoning environmental problems. The Article concludes by describing contemporary models of environmental federalism and the implications of recent legislative and judicial developments for them.

2. See, e.g., Dan Balz, *Governors Press Congress for Power to Manage Programs at State Level*, WASH. POST, Dec. 11, 1994, at A6; Dan Balz, *GOP Governors Seek Shift in Power*, WASH. POST, Dec. 21, 1994, at A1.

3. See *United States v. Lopez*, 115 S. Ct. 1624 (1995); *U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842 (1995).

4. See, e.g., Jerry Gray, *Senate Votes to Let States Set Car Speeds*, N.Y. TIMES, June 21, 1995, at A12; Gerald F. Seib, *GOP Governors Consider New Congress a Partner in Returning Power to States*, WALL ST. J., Nov. 21, 1994, at A2.

5. See John J. Fialka, *Legislatures Seek "Conference of States"*, WALL ST. J., Mar. 6, 1995, at A9; *Federalism, Too*, WALL ST. J., Jan. 3, 1995, at A8 (editorial). Fourteen state legislatures have adopted resolutions calling for a conference of states. One measure likely to be considered at such a conference would allow the nullification of federal laws if two-thirds of state legislatures vote to veto them. John J. Fialka, *Militia Network Forces Postponement of Power-Sharing Conference by States*, WALL ST. J., May 6, 1995, at A12.

I. ENVIRONMENTAL FEDERALISM: AN INTRODUCTION

Our Constitution and the structure of government it established were the product of compromise between proponents of a powerful national government and advocates of broad state sovereignty. The system of dual sovereignty established by the Constitution has been hailed as a unique political achievement.⁶ Yet, federalism is the one structural element in the Constitution whose meaning and contours have been fraught with the most uncertainty.

Since its acceptance of New Deal legislation, the Supreme Court has been hard pressed to enunciate principled, judicially enforceable, limits on federal power. Two decades ago, the Court attempted to protect the states' "traditional governmental functions" from federal intrusion,⁷ but it later abandoned such efforts as unworkable and deemed the federal political process as the most effective mechanism for protecting state interests.⁸ More recently, the Court has embraced some judicially enforceable limits on federal regulatory authority as necessary to preserve political accountability⁹ and to prevent Congress from assuming a seemingly limitless general police power.¹⁰ The Court's struggle to define the contours of federalism reflects both the difficulty of constitutional line-drawing in the face of rapid economic and social change, and the intensely political character of questions involving the allocation of power between different levels of government.

In light of the legal uncertainty that prevails in this area, it is hardly surprising that contemporary debates over federalism embrace very different conceptions of how power, resources, and responsibility should be divided among different government entities. Political expediency often prevails over principle in influencing the positions various parties take during federalism debates.¹¹ As a result, debates over what level of government is best suited to perform various functions can create strange bedfellows. Those who support devolution of

6. *Lopez*, 115 S. Ct. at 1637 (Kennedy, J., concurring) ("[F]ederalism was the unique contribution of the Framers to political science and to political theory."); *U.S. Term Limits*, 115 S. Ct. at 1872 (Kennedy, J., concurring).

7. *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

8. *Garcia*, 469 U.S. at 531, 552.

9. *See, e.g., New York v. United States*, 112 S. Ct. 2408 (1992).

10. *Lopez*, 115 S. Ct. at 1633.

11. *See* E.J. Dionne, Jr., *The New, New, New Federalism*, WASH. POST, Mar. 7, 1995, at A17 (noting that "for all the high-toned arguments, federalism and 'the genius of the states' are almost always invoked more as tactics than as principles" and that "liberals and conservatives have shifted to and fro on federalism, depending on their needs at a given moment").

greater responsibility to lower levels of government can become vociferous advocates of federal preemption when it is perceived to benefit their interests on other issues.¹² In similar fashion, state and local officials often are enthusiastic about reducing federal power, but they are anything but supportive of reducing the federal financial assistance they receive.

Like civil rights law, environmental law became federalized only after a long history of state failure to protect what had come to be viewed as nationally important interests. Just as "states rights" became a code word of support for segregation during the civil rights debates of the 1950s and 1960s,¹³ cries for greater state autonomy are viewed by many environmentalists today as cover for efforts to roll back environmental standards. Despite the Republican takeover of Congress, most Americans continue to believe that the federal government should have more responsibility for environmental protection than the states.¹⁴ This belief may reflect an understanding that effective environmental protection policy did not evolve until, as discussed below, the federal government began to play an active regulatory role.

Despite public support, federal environmental standards have been a chronic source of friction for federal-state relations, particularly when applied to facilities operated by state and local governments. State and local governments argue that federal regulations infringe on their autonomy and sovereignty, and that they impose costly unfunded mandates states can ill afford. Even though Congress has taken care to ensure that federal environmental law rarely preempts state standards, states argue that they should be given more freedom and flexibility to develop environmental standards tailored to local circumstances.

Enforcement of environmental standards has been another source of federal-state conflict. Federal environmental officials have had great difficulty ensuring that states meet minimum federal standards. The crude tools available for enforcing such standards, for ex-

12. See, e.g., Albert R. Hunt, *Federalism Debate Is as Much About Power as About Principle*, WALL ST. J., Jan. 19, 1995, at A19 (noting that conservative Republicans in Congress who ostensibly support devolution of power to state and local governments also support measures to federalize major aspects of tort law, to expand federal criminal jurisdiction, and to preempt aspects of state banking regulation).

13. See George F. Will, *Making States' Rights Respectable Again*, WASH. POST, Jan. 1, 1995, at C7 (acknowledging that the phrase "states' rights" was once a form of "encoded racism"); Dionne, *supra* note 11.

14. When asked "[w]hich do you think should have more responsibility for achieving the . . . goal [of protecting the environment]: federal or state government?," in January 1995, respondents to a *Wall Street Journal*/NBC News Poll selected the federal government by a margin of 50% to 38%. Hunt, *supra* note 12, at A19.

ample, a withdrawal of federal funds or a federal takeover of state environmental programs, have added even more aggravation to the federal-state maelstrom. Because it owns many facilities that have been among the most notorious violators of the environmental laws, the federal government does not bring entirely clean hands to enforcement issues. States have had great problems seeking to force federal facilities to comply with environmental standards.

The articles in this Symposium examine these and other issues of environmental federalism through diverse lenses. Focusing on the checkered history of federal efforts to bring states into compliance with national ambient air quality standards under the Clean Air Act, John Dwyer argues that states retain considerable political vitality because their active participation in the program is essential to effective implementation of the Act.¹⁵ Focusing largely on the Clean Air Act, Jim Krier challenges an important premise of national environmental policy by arguing that uniform federal standards are a mirage.¹⁶ Oliver Houck and Michael Rolland explore federalism issues raised by wetlands regulation by considering experience with delegation of the Clean Water Act's section 404 program to the states.¹⁷ Dan Tarlock argues that federalism impedes the design of effective policies to promote biodiversity because ecosystem boundaries do not correspond neatly to the boundaries of political subdivisions.¹⁸

Federal preemption of state regulations implicates basic federalism concerns. Former New Jersey Governor Jim Florio, who played a major role in writing environmental legislation during his eight terms in Congress, examines federalism issues related to the Toxic Substances Control Act, one of the few federal laws with an express preemption provision.¹⁹ Jerome Organ documents how some states have responded to federal directives by adopting laws that prohibit state regulations from exceeding minimum federal standards, thus converting federal floors into ceilings.²⁰ Peter Menell challenges the wis-

15. John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183 (1995).

16. James E. Krier, *On the Topology of Uniform Environmental Standards in a Federal System—and Why it Matters*, 54 MD. L. REV. 1226 (1995).

17. Oliver A. Houck & Michael Rolland, *Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 MD. L. REV. 1242 (1995).

18. A. Dan Tarlock, *Biodiversity Federalism*, 54 MD. L. REV. 1315 (1995).

19. Jim Florio, *Federalism Issues Related to the Probable Emergence of the Toxic Substances Control Act*, 54 MD. L. REV. 1354 (1995).

20. Jerome M. Organ, *Limitations on State Agency Authority to Adopt Environmental Standards More Stringent Than Federal Standards: Policy Considerations and Interpretive Problems*, 54 MD. L. REV. 1373 (1995).

dom of federal and state regulations requiring disclosure of environmental information and advocates a market-oriented approach to providing eco-information to consumers.²¹

Several articles consider federalism issues from the perspective of environmental enforcement. Melinda Kassen examines the difficulties states confront when trying to bring federal facilities into compliance with environmental standards.²² Focusing on federal hazardous waste legislation, Adam Babich argues that, while federalism has largely failed to contain national power or to stimulate experimentation by states, it has created a potentially effective mechanism for ensuring compliance by polluting government entities at both the federal and state levels.²³ David Hodas argues that citizen suits add an important dimension to Congress's scheme of shared enforcement authority between federal officials and state governments which will be sacrificed if the current trend of increasing state preemption of citizen enforcement is allowed to continue.²⁴

Issues of federalism are not unique to our system of government. As international trade liberalization and the rapid growth of the global economy make nations increasingly interdependent, international institutions are acquiring greater influence over economic and social conditions in individual countries. In marked contrast to the movement toward devolution in the United States, European nations are moving toward consolidation and harmonization of regulatory and governmental functions in the European Union. Cliona Kimber examines how the European Union has sought to apply common environmental standards to diverse states and explores the lessons of this experience for environmental federalism concerns in the United States.²⁵

II. A BRIEF HISTORY OF ENVIRONMENTAL FEDERALISM

The federal government now plays the dominant role in environmental protection policy in the United States. Yet, this is a relatively

21. Peter S. Menell, *Restructuring a Market-Oriented Federal Eco-Information Policy*, 54 MD. L. REV. 1435 (1995).

22. Melinda R. Kassen, *The Inadequacies of Congressional Attempts to Legislate Federal Facility Compliance with Environmental Requirements*, 54 MD. L. REV. 1475 (1995).

23. Adam Babich, *Our Federalism, Our Hazardous Waste, and Our Good Fortune*, 54 MD. L. REV. 1516 (1995).

24. David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority Is Shared by the United States, the States, and Their Citizens?*, 54 MD. L. REV. 1552 (1995).

25. Cliona J.M. Kimber, *A Comparison of Environmental Federalism in the United States and the European Union*, 54 MD. L. REV. 1658 (1995).

recent development in the history of the republic. While the federal government has long played a major role in resource development policy because of its large land holdings, environmental protection was considered the exclusive responsibility of local or state governments. Most existing federal regulatory programs were not created until after a long history of state failures to cope with problems that became increasingly interstate in scope. The evolution of national environmental policy can be divided into six historical periods.

A. *The Common Law and Conservation Era: Pre-1945*

The early history of federal environmental policy was dominated by disputes over development of the public lands. Uncertainty about the scope of federal power made federal regulatory intervention exceedingly rare. In the absence of regulatory standards, federal common law was invoked by states seeking protection against interstate pollution.

1. *Natural Resource Policy and the Conservation Movement.*—Because of the federal government's vast holdings of public lands, federal policies have long played an inescapably important role in natural resource development. In the early years of the republic, the federal government used the sale of public lands as an important source of revenue. Grants of federal land encouraged states to undertake development projects at a time when federal authority to act was widely questioned. In 1849, Congress created the Department of the Interior in part to relieve the Treasury Department of the burden of managing massive transfers of federal land to private parties.²⁶

Early federal policy focused almost exclusively on promoting development of natural resources. A series of federal laws encouraged private development of public lands, including the Homestead Act of 1862 and the Mining Act of 1872. Railroads also acquired title to nearly 180 million acres of public land through land grants to encourage railroad construction.²⁷ While Thomas Jefferson's vision of a nation of yeoman farmers was invoked repeatedly to justify divestiture of public lands, most lands transferred to private ownership ended up in the hands of large ranchers, timber companies, or railroads.²⁸ As Dan Tarlock notes, federalism conflicts were avoided during this pe-

26. See J. William Futrell, *The History of Environmental Law*, in SUSTAINABLE ENVIRONMENTAL LAW 12 (1993).

27. ROY M. ROBBINS, *OUR LANDED HERITAGE: THE PUBLIC DOMAIN, 1776-1970* (1976).

28. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 418-19 (2d ed. 1985).

riod because federal policy coincided with state interests in promoting development.²⁹

Conservation concerns eventually became influential, as Tarlock notes, in part because of emerging scientific information about the consequences of unbridled resource exploitation.³⁰ The progressive conservation movement, which sought a greater federal role in natural resource management, helped to spur establishment of the first national park, Yellowstone, in 1872, though support also came from railroad companies who were seeking to promote tourism and to further the development of western lands. In 1891 Congress enacted the Forest Reserve Act, which withdrew federal forest lands from development under the Homestead Act, marking a shift in the federal role away from development and toward conservation.³¹ This shift did not occur without controversy. After President Cleveland used his new withdrawal powers to create 21 million acres of new forest reserves, protests from western interests caused incoming President McKinley to convene a special session of Congress.³² As Tarlock notes, the federal tilt toward conservation caused political controversy because it shocked private parties and states who had become accustomed to a federal role limited to expediting the transfer of public lands or setting ground rules for their exploitation.³³ Tarlock traces the lingering presumption of state control of natural resources to the federal government's belated assertion of a national interest in natural resources management policy.³⁴

2. *Early Instances of Federal Regulation.*—Prior to World War II, environmental regulation was almost exclusively the province of local, and occasionally state, governments. By the mid-nineteenth century, the Supreme Court had confirmed that states had broad police powers that could be used to regulate businesses.³⁵ Local ordinances to protect public health and to require the abatement or segregation of public nuisances were not uncommon, but they were poorly designed and rarely enforced in the absence of a professional civil service. Like the early English anti-pollution laws, smoke abatement ordinances were among the first locally imposed environmental regulations in the

29. Tarlock, *supra* note 18, at 1341.

30. *Id.* at 1342.

31. See Act of May 20, 1862, ch. 75, 12 Stat. 392.

32. Futrell, *supra* note 26, at 16.

33. Tarlock, *supra* note 18, at 1341.

34. *Id.*

35. See, e.g., *The License Cases*, 46 U.S. (5 How.) 504 (1847).

United States. While such regulations were common,³⁶ they faced difficulties in specifying precisely what levels of emissions were proscribed.³⁷

During the nineteenth and early twentieth century, instances of federal regulation that promoted protection of public health and the environment were notable primarily for their rarity. The few pieces of federal regulatory legislation enacted during this period were the product of efforts to remove barriers to commerce on inland waterways.³⁸ In 1838, Congress enacted legislation mandating safety regulations to prevent steamship boilers from exploding. The legislation responded to a highly visible problem that plagued interstate commerce, which then was conducted in large part on interstate waterways. In 1899, Congress adopted the Refuse Act,³⁹ which prohibited discharges of refuse into navigable waters without a permit from the Secretary of the Army.⁴⁰ This legislation, which was part of the Rivers and Harbors Act, was not inspired by environmental concerns. Rather, Congress wanted to prevent barriers to navigation on the waterways. The law had little effect on environmental quality until the late 1960s when environmentalists resuscitated it through citizen suits to stop water pollution.

Early laws to control potentially toxic substances also were not inspired by environmental concerns. In 1906, Congress adopted the Pure Food and Drug Act⁴¹ and shortly thereafter enacted the Insecticide Act of 1910.⁴² Like the antitrust laws of the period, these laws were designed to protect consumers and to preserve interstate competition by prohibiting the sale of adulterated or misbranded food, drugs, or pesticides. These statutes did not envision the federal government as a protector of public health or a defender of the environment. Rather, Congress primarily sought to remove barriers to

36. See, e.g., *Northwestern Laundry v. City of Des Moines*, 239 U.S. 486 (1916).

37. See, e.g., *Sigler v. Cleveland*, 4 Ohio Dec. 166 (C.P. Cuyahoga 1896) (holding that an ordinance outlawing "dense smoke" was unconstitutionally overbroad because it was so vague that it could ban all smoke).

38. It was widely assumed at the time that federal authority to regulate navigation under the Commerce Clause extended only to commercially navigable rivers. Tarlock, *supra* note 18, at 1345-46.

39. Act of Mar. 3, 1899, ch. 425, 30 Stat. 1151 (repealed 1972).

40. In the early 1820s, the Army Corps of Engineers had been given responsibility for improving the nation's rivers and harbors in one of the first major, federal public works programs. Futrell, *supra* note 26, at 12. As Tarlock notes, there were few conflicts between the states and the Corps because Congress initially required projects undertaken by either the Corps or the federal Bureau of Reclamation to comply with state law and to acquire whatever water rights were necessary under state law. Tarlock, *supra* note 18, at 1342.

41. Act of June 30, 1906, ch. 3915, 34 Stat. 768 (repealed 1938).

42. Act of Apr. 26, 1910, 36 Stat. 331 (repealed 1940).

interstate commerce, whether they involved exploding steamships, refuse blocking waterways, or falsely advertised drugs or pesticides.

In one rare and little known instance, Congress did use federal authority during this period to protect public health. This occurred in response to a disease that had become the focus of international attention. The Esch-Hughes Act of 1912 sought to eliminate the use of white phosphorous in match manufacturing to prevent phosphorous necrosis, a disease caused by exposure to white phosphorous fumes.⁴³ First diagnosed in 1839, the disease came to be known as "phossy jaw" because it caused many workers in match manufacturing to be afflicted with a painful and horribly disfiguring rotting of the jawbone into a nauseating pus. Following the development of a red phosphorous "safety match," which did not cause the disease, white phosphorous matches were banned in Finland in 1872, in Denmark in 1874, and in France in 1897.⁴⁴ The international labor movement pressed for a universal agreement to ban the use of white phosphorous in matches.⁴⁵ In 1906, eight European countries met in Berne, Switzerland to sign a treaty calling for an international ban on white phosphorous matches. After ten years of effort to regulate worker exposure to white phosphorous failed to reduce the incidence of phossy jaw, Britain banned the use of white phosphorous in match production in December 1908.⁴⁶

In the United States, a Bureau of Labor study finding widespread worker exposure to white phosphorous in match plants produced an outcry in the muckraking press and calls for regulatory action. While Ohio had banned child labor in match factories, no state had acted to ban white phosphorous matches. States were reluctant to adopt measures to protect worker health out of fear that such measures would drive employers out of state. For example, the initial New York Workmen's Compensation Law of 1910 was limited only to industries not affected by interstate competition. Yet, Congress did not believe that it had the constitutional authority under the Commerce Clause to ban the use of white phosphorous in all match production. Thus, the bill

43. Pub. L. No. 62-112, 37 Stat. 81 (1912); see R. Alton Lee, *The Eradication of Phossy Jaw: A Unique Development of Federal Police Power*, THE HISTORIAN, Nov. 1966, at 1, 3.

44. Lee, *supra* note 43, at 4-5.

45. At the Congress for International Labor Legislation held in Brussels, September 27, 1897, Belgium's chief labor inspector proposed "the suppression of industrial poisons by international agreement." He observed that "a trial of such legislation might be conveniently made by the international prohibition of the use of white lead and white phosphorus." BOUTELLE E. LOWE, THE INTERNATIONAL PROTECTION OF LABOR 37 (1921).

46. HOUSE COMM. ON WAYS AND MEANS, TAXING WHITE PHOSPHOROUS MATCHES, H.R. DOC. NO. 406, 62d Cong., 2d Sess. 5 (1912).

introduced by Congressman John Esch of Wisconsin sought to accomplish the same end by imposing a prohibitive tax on white phosphorous matches.⁴⁷ The bill initially died in committee, but was revived when President Taft, described phossy jaw as "frightful" and called for "imposition of a heavy federal tax" on white phosphorous in his State of the Union Message in December 1910.⁴⁸

Arguing that it was preferable to have a uniform national policy, the Diamond Match Company, the largest American match company and the sole American owner of the patent for the safe sesquisulphide process, supported a nationwide tax on white phosphorous matches. In response to claims of another match company that the measure would be anticompetitive, Diamond Match ultimately agreed to cancel its patent to enable all match manufacturers to use the process. Congress enacted the Esch-Hughes Act in April 1912.⁴⁹ The Act levied a prohibitive tax on matches containing white phosphorous and prohibited the exportation or importation of the same. Because it was national in scope, the tax overcame the fears of states that state-level regulations would drive business to other states. This achieved essentially the same result as that intended by the Berne Convention of 1906.⁵⁰

While an important, though largely unknown, precedent for federal regulation, the Esch-Hughes Act was not intended to signal an expanded federal role in health and safety regulation. Indeed, the House committee report on the legislation stressed that because "a situation like the one now presented in the match industry will rarely arise," the legislation "will not serve as a precedent for the general employment of the taxing power to correct objectionable features of industries."⁵¹ But this episode demonstrates that a national industry's desire for uniformity in regulation could overcome objections to national regulation even at a time when Congress's constitutional authority in this area was viewed as far more limited than it is today. Use of the federal taxing power proved to be an astute means for overcoming judicially imposed limits on federal regulatory authority.⁵² The

47. *Id.* at 2-3.

48. *Id.* at 9; *see also* 46 CONG. REC. 3625-33 (1911).

49. Pub. L. No. 62-112, 37 Stat. 81.

50. H.R. Doc. No. 406, at 6, 9-11.

51. *Id.* at 2.

52. In *Lochner v. New York*, 198 U.S. 45 (1905), the Supreme Court had declared unconstitutional a state law restricting the work week of bakers, and in *United States v. Johnson*, 221 U.S. 488 (1911), it had narrowly construed the Pure Food and Drug Act to hold that its prohibition of misleading labeling did not bar false claims that a medicine was a cancer cure. The Court subsequently invalidated a federal ban on interstate commerce

constitutionality of the Esch-Hughes Act was not challenged, in light of the Supreme Court having previously upheld the constitutionality of a prohibitive federal tax on artificially colored oleomargarine.⁵³

3. *Use of Federal Common Law to Protect State Interests.*—In the absence of regulatory standards, the common law was the principle legal instrument for addressing pollution problems. While the difficulty of proving causal injury was a major obstacle to successful common law nuisance actions, states at the turn-of-the-century sought to use federal common law to protect them against interstate air and water pollution. In a series of celebrated cases, states invoked the original jurisdiction of the United States Supreme Court to bring common law nuisance actions against other states. In *Missouri v. Illinois*,⁵⁴ the state of Missouri sued Illinois in an effort to stop the City of Chicago from dumping its raw sewage in a canal that eventually deposited it into the Mississippi River. Missouri alleged that Chicago's sewage polluted the drinking water of the City of St. Louis and caused an increase in illnesses and deaths there. The Court rejected Illinois's attempt to have the case dismissed on jurisdictional grounds, in an opinion by Justice Holmes that affirmed the Court's authority "to deal with a situation which, if it arose between independent sovereignties, might lead to war."⁵⁵ In 1911, the Supreme Court decided that Missouri had not proved that Chicago's sewage discharges were causing actual harm to the residents of St. Louis. This, coupled with Missouri's own practice of allowing its cities to discharge raw sewage into the river, convinced the Court not to grant Missouri the injunction it had requested.

In 1907, the Supreme Court decided *Georgia v. Tennessee Copper Co.*,⁵⁶ in which the Court granted the state of Georgia an injunction to restrict sulfur dioxide emissions from a copper smelter across the border in Tennessee. Citing *Missouri v. Illinois*,⁵⁷ the Court noted that "[w]hen the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possi-

in products made with child labor as interfering with the "purely local" activity of manufacturing, *Hammer v. Dagenhart*, 247 U.S. 251 (1918), *overruled by* *United States v. Darby*, 312 U.S. 100 (1941) (upholding the Fair Labor Standards Act), which would have undermined the constitutionality of any federal prohibition on white phosphorous under the commerce power.

53. *McCray v. United States*, 195 U.S. 27 (1904).

54. 200 U.S. 496 (1906).

55. *Id.* at 518; *see also* *Missouri v. Illinois*, 180 U.S. 208 (1901).

56. 206 U.S. 230 (1907).

57. *Missouri v. Illinois*, 180 U.S. at 241.

bility of making reasonable demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in this court." The Court concluded that states have greater rights to seek abatement of nuisances than private parties, because "[t]he States by entering the Union did not sink to the position of private owners subject to one system of private law."⁵⁸

Conflicts over interstate pollution problems continued in subsequent decades. Shortly after the turn of the century, several New Jersey cities built a large sewer line that would transport their raw sewage directly into New York Bay. By 1911, New Jersey cities were discharging 120 million gallons of sewage per day into the bay despite protests from New York authorities. New York then filed a common law nuisance action in the Supreme Court. The case was argued in 1918, five years after testimony before a special master had been concluded, and after New Jersey had agreed to install sedimentation basins with scum boards and coarse screens to remove floating matter. In 1921, the Supreme Court denied New York's request for an injunction.⁵⁹ The Court emphasized that New York had failed to prove that there were visible suspended particles, odors, or a reduction in the dissolved oxygen content of the Bay sufficient to interfere with aquatic life. It also observed that New York discharged its own sewage from 450 sewers directly into the adjacent waters.

In another case, the Supreme Court did intervene to enjoin interstate water pollution. In May 1929, New Jersey filed a public nuisance action in the Supreme Court against New York City, in which it asked the Court to prohibit the city from dumping garbage into the ocean where it would wash onto New Jersey's shore. A special master appointed by the Court ultimately found that enough garbage had washed upon New Jersey's beaches to fill fifty trucks and that the garbage had made swimming impracticable and had damaged fish nets. The master recommended that New York be enjoined from ocean dumping with the injunction to take effect after the city was given a reasonable time to construct more incinerators to dispose of its garbage. The Court approved this recommendation in *New Jersey v. City of New York*⁶⁰ and remanded the case to the master to decide how much time the city needed to construct additional incinerators. On December 7, 1931, the Supreme Court issued an injunction prohibiting New

58. *Id.* at 238.

59. *New York v. New Jersey*, 256 U.S. 296, 309 (1921).

60. 283 U.S. 473 (1931).

York City, effective June 1, 1933, from dumping garbage off the coast of New Jersey.⁶¹

Less than a month before the deadline for New York City to stop ocean dumping, New Jersey asked the Supreme Court to hold New York in contempt for failing to commence construction of additional incinerators. Making an argument that sounds like current complaints over unfunded mandates, New York argued that construction of the incinerators had been unavoidably delayed by a lack of funds. The state asked the Court to extend the deadline by ten months to April 1, 1934. After the special master reported that the city had begun construction of two incinerators that would not be ready for operation until April 21, and June 30, 1934, the Court then extended the deadline for the city to stop ocean dumping to July 1, 1934, and specified that violations would result in a penalty of \$5000 per day to be paid by New York City to New Jersey.⁶²

Under the federal common law of nuisance, the Supreme Court had a firm foundation for issuing an injunction to restrain interstate pollution. The Court recognized that a major obstacle to effective pollution control was the reluctance of politically accountable officials to implement policies that would raise local waste disposal costs. However, the Court already had expressed misgivings about its competence to establish emission and discharge limits in federal common law nuisance actions. In the absence of federal environmental agencies, the alternative that the Court recommended was greater cooperation among the states. While refusing the injunction sought by New York against New Jersey's sewage disposal practices, the Court stated that the interstate sewage disposal problem "is one more likely to be wisely solved by cooperative study and by conference and mutual concession on the part of the representatives of the States so vitally interested in it than by proceedings in any court however constituted."⁶³

The Great Depression convincingly demonstrated that state efforts alone were inadequate for responding to national economic problems. The New Deal programs enacted in response to the De-

61. *New Jersey v. City of New York*, 284 U.S. 585 (1931).

62. *New Jersey v. City of New York*, 289 U.S. 712 (1933).

63. *New York v. New Jersey*, 256 U.S. at 313. Eventually the Court refused to hear interstate pollution disputes under its original jurisdiction. In *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) (*Milwaukee I*), the Court held that the federal district courts were the proper forum for hearing a nuisance action by Illinois charging four Wisconsin cities with polluting Lake Michigan. The Court subsequently held that enactment of the Clean Water Act preempted federal common law actions for water pollution because of the comprehensive regulatory scheme Congress had adopted. *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981) (*Milwaukee II*).

pression did not address environmental problems, but they transformed conceptions of federalism by creating a kind of presumption that national regulation was necessary for responding to national problems.⁶⁴ However, it was not until after World War II that the national interest in environmental protection policy assumed greater visibility.

B. Federal Assistance for State Environmental Problems: 1945-1962

After World War II, the federal role in pollution control began a subtle transformation that one commentator has described as "creeping federalization."⁶⁵ As increased industrial production exacerbated interstate pollution problems, Congress became more active in encouraging states to respond to environmental problems. Congress initially did not opt to impose national regulation. Instead, it sought to provide federal financial aid and research assistance to state and local governments to help them address environmental concerns. Pollution control was still viewed essentially as a local or state responsibility. The Federal Water Pollution Control Act of 1948⁶⁶ authorized federal funding for research and for grants to state water pollution control programs. Rather than imposing federal regulations to control interstate water pollution, Congress emphasized common law remedies. It declared that interstate pollution was a public nuisance, actionable by the Attorney General, if it was determined to endanger the public health or welfare. The determination was to be made through a cumbersome procedure that involved a hearing conducted by the Surgeon General. Subsequent legislation sought to encourage state pollution control efforts by offering offered larger federal carrots and an occasional stick.

In 1956, Congress provided funding for the construction of municipal sewage treatment plants over President Eisenhower's veto. Proponents of this legislation argued that because the benefits of sewage treatment accrued largely to downstream cities, federal aid was appropriate to provide an incentive for cities to build treatment plants. President Eisenhower maintained that the construction of sewage treatment plants "is strictly local in character" and a responsi-

64. Tarlock, *supra* note 18, at 1320-21.

65. Futrell, *supra* note 26, at 38.

66. Act of June 30, 1948, ch. 758, 62 Stat. 1155 (completely revised by Pub. L. No. 92-500, § 2, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§ 1251-1376 (1988 & Supp. V 1993))).

bility that "belongs with local government."⁶⁷ He expressed the fear that the federal government could become too powerful and that if it "begins to run riot with the expenditures that it deems good for the country," excesses would occur because the federal government "can print money," unlike state or local authorities.⁶⁸

In subsequent years, President Eisenhower unsuccessfully urged Congress to discontinue federal funding for the construction of sewage treatment plants.⁶⁹ In his final budget message to Congress in 1961, President Eisenhower continued to argue that "control of water pollution is principally a local responsibility" that "requires greater financial and enforcement efforts by local interests." However, he also acknowledged that the federal government had a role to play in pollution control. He stated that the "Federal Government can most appropriately assist State and local governments through legislation (1) to strengthen its enforcement powers" and (2) by "assuring that highest priority is given to waste treatment construction grants for projects which contribute to the reduction of pollution of interstate and coastal streams."⁷⁰ While sewage treatment construction grants became a major program of federal financial assistance, Congress did not impose national pollution control regulations. Rather, it continued to encourage states to regulate on their own by requiring them to submit water pollution control plans as a condition for obtaining such grants. This proved to be a dismal failure at achieving effective pollution control. Rivers that caught fire because of their high concentrations of flammable pollutants were not uncommon during this period, as David Hodas explains.⁷¹

The federal environmental programs of the 1950s and 1960s remained premised on the notion that environmental problems were the responsibility of state and local governments. Notwithstanding increased federal financial assistance, states retained the responsibility for making their own determinations of how to control pollution. As the interstate character of pollution problems became increasingly ap-

67. 1 PUBLIC PAPERS OF THE PRESIDENTS: DWIGHT D. EISENHOWER ¶ 207, at 714 (1983) (Remarks of President Eisenhower at News Conference of Oct. 3, 1957).

68. *Id.*

69. *See, e.g., id.* ¶ 106, at 409 (Letter to the Speaker of the House of Representatives Urging Legislation To Carry Out Recommendations of the Joint Federal-State Action Committee, May 14, 1958); *id.* ¶ 294, at 777 (Remarks at the Civic Auditorium, San Francisco, California, Oct. 21, 1958) (citing ballooning federal participation in water pollution programs while decrying the trend toward "a far-off centralized bureaucracy dominating your local affairs").

70. *Id.* ¶ 414, at 1008 (Annual Budget Message to the Congress: Fiscal Year 1961, Jan. 19, 1961).

71. *See Hodas, supra* note 24, at 1554 n.7.

parent, this conception of the appropriate federal and state roles came under increasing challenge. The realization that pollutants do not respect state, or even national boundaries was reinforced by scientists' warnings that the entire planet was being dangerously poisoned by radiation from atmospheric nuclear tests. The notion that the appropriate federal role in pollution control was non-regulatory became increasingly tenuous.

When Congress adopted legislation in 1955 directing the Department of Health, Education and Welfare (HEW) to conduct a five-year program of research on the effects of air pollution, it continued to emphasize that pollution control was primarily a state responsibility. But by 1960, Congress had begun to acquire some appreciation of the national dimensions of the air pollution problem. Following California's lead, Congress recognized that a major source of the problem came from automobiles. Thus, it mandated a federal study to determine what levels of automobile emissions were safe. In 1963, when it enacted an early version of the Clean Air Act, Congress recognized that some parts of the nation had severe interstate air pollution problems. But, as John Dwyer notes, Congress expressly stated that air pollution control was primarily a state and local responsibility.⁷² Its initial response to interstate air pollution problems was to establish a system for investigating them and to encourage adjacent states to get together and determine how best to respond to them. The Act directed HEW to publish national air quality criteria. The cumbersome conference procedure that it authorized was used only once to abate an interstate air pollution problem.

The pattern of providing federal research and financial assistance to encourage the states to address environmental problems was also the model employed in the Solid Waste Disposal Act of 1965.⁷³ It proved to be a dismal failure at stimulating significant pollution control efforts because states resisted the enactment of strong environmental measures for fear that they might encourage industries to relocate in competing states.

C. The Rise of the Modern Environmental Movement: 1962-1970

The third phase in the evolution of national environmental policy marks the rise of the contemporary, national environmental movement. This period is often traced from 1962 when Rachel Carson's

72. Dwyer, *supra* note 15, at 1191 n.29.

73. Pub. L. No. 89-272, 79 Stat. 997 (1965) (amended generally by Pub. L. No. 94-580, § 2, 90 Stat. 2795 (1976) (codified as amended at 42 U.S.C. §§ 6901-6987 (1988 & Supp. V 1993))).

Silent Spring was first published. The book stimulated grassroots activism to protect the environment by making the public apprehensive about the bioaccumulative effects of chemicals being used as pesticides. Fears that these pesticides could bioaccumulate in the food chain and cause severe, long-term ecological and public health damage received widespread publicity. Coupled with a series of other, highly publicized environmental incidents, including Japan's mercury poisoning tragedy at Minimata and a proposal to dam the Grand Canyon, these fears helped mobilize citizen activists to demand a government more sympathetic to environmental concerns.

Efforts to reconcile environmental concerns with policies favoring development of public resources were a persistent congressional battleground. Environmental interests began to prevail with some regularity only during the 1960s, when the growing popularity of outdoor recreation and concern over environmental damage caused by public works projects helped to produce landmark legislation. This included the Multiple-Use Sustained-Yield Act,⁷⁴ which directs federal agencies to manage the national forests to serve the multiple uses of "recreation, range, timber, watershed, and wildlife and fish purposes," the Wilderness Act of 1964,⁷⁵ and the Wild and Scenic Rivers Act in 1968.⁷⁶

To the extent that federal law was regulatory in character prior to 1970, the primary targets of environmental regulation were federal agencies rather than private industry. In legislation, like the National Historic Preservation Act of 1966,⁷⁷ Congress sought to ensure that government agencies respected social and cultural values when pursuing development projects. Section 4(f) of the Department of Transportation Act of 1966⁷⁸ sought to prevent federally funded construction projects from damaging parks, recreation areas, wildlife refuges, and historic sites. Like the Fish and Wildlife Coordination Act of 1958,⁷⁹ which required that federal agencies consult the federal Fish and Wildlife Service in connection with water projects, this legis-

74. Pub. L. No. 86-517, 74 Stat. 215 (1960) (codified as amended at 16 U.S.C. §§ 528-531 (1988 & Supp. V 1993)).

75. Pub. L. No. 88-577, 78 Stat. 890 (1964) (codified as amended at 16 U.S.C. §§ 1131-1136 (1988 & Supp. V 1993)).

76. Pub. L. No. 90-542, 82 Stat. 906 (1968) (codified as amended at 16 U.S.C. § 1271-1287 (1988 & Supp. V 1993)).

77. Pub. L. No. 89-665, 80 Stat. 915 (1966) (codified as amended at 16 U.S.C. § 470-470mm (1988 & Supp. V 1993)).

78. Pub. L. No. 89-670, 80 Stat. 933 (1966) (Section 4(f) repealed 1983).

79. Pub. L. No. 85-624, 72 Stat. 563 (1958) (codified as amended at 16 U.S.C. §§ 661-666c (1988 & Supp. V 1993)).

lation focused on incorporating environmental concerns into federal resource management decisions. These laws laid the groundwork for the subsequent enactment of the landmark National Environmental Policy Act of 1969 (NEPA),⁸⁰ which required federal agencies to prepare detailed environmental impact statements before taking any action with a significant impact on the environment.

While the Sierra Club, the Audubon Society, and the Wilderness Society had a long history of activism in support of preservation of natural areas, several new, national environmental organizations emerged during the late 1960s. In 1967, the Environmental Defense Fund was formed by a group of scientists who sought to have DDT banned. Another group, the Natural Resources Defense Council, formed as a result of efforts to force the Federal Power Commission to consider environmental concerns when licensing a pumped storage facility at Storm King Mountain. These efforts had spawned the *Scenic Hudson Preservation Conference* decision,⁸¹ which established that courts could require federal agencies to pay heed to environmental concerns. Judicial review of agency action became an important new battleground for environmental groups.

These developments coincided with an unprecedented upwelling of grassroots support for environmental protection measures, culminating in the nation's celebration of the first Earth Day on April 22, 1970. This contributed to a political climate extremely favorable to environmental legislation. On New Year's Day in 1970, President Nixon signed into law the National Environmental Policy Act (NEPA). This law did not impose any new responsibilities on state or local governments. Instead, it sought fundamentally to change the way in which federal agencies approached environmental concerns. As noted above, NEPA required federal agencies to consider environmental impacts and alternative courses of action before taking any action likely to have a significant effect on the environment. As a result, federal agencies that previously had not viewed environmental protection as part of their mission had to hire new staff with environmental expertise. Although the law did nothing specific to regulate pollutant discharges, it helped provide new opportunities for environmentally concerned citizens to challenge agency decisions. As the judiciary became more involved in reviewing agency actions, environmental groups acquired new tools to ensure that agencies became more re-

80. Pub. L. No. 91-190, 83 Stat. 852 (1970) (current version at 42 U.S.C. §§ 4321-4332(2)(c) (1988 & Supp. V 1993)).

81. *Scenic Hudson Preservation Conference v. Federal Power Comm'n*, 354 F.2d 608 (2d Cir. 1965).

sponsive to the environmental concerns reflected in the ambitious legislation that followed during the 1970s.

D. Erecting the Federal Regulatory Infrastructure: 1970-1980

The federal environmental laws that were enacted in the 1960s were the precursors of what today are laws that mandate comprehensive national regulation—the Clean Air Act,⁸² the Clean Water Act,⁸³ the Safe Drinking Water Act,⁸⁴ and the Resource Conservation and Recovery Act (RCRA).⁸⁵ The non-regulatory character of federal environmental legislation changed dramatically beginning in 1970 with the enactment of these and other laws mandating far more ambitious and pervasive forms of federal regulation. As noted above, the antecedents for these pieces of regulatory legislation generally were years of federal financial aid to encourage states to address environmental problems on their own. Congress imposed national regulations to control pollution only after its efforts to prod states to act had failed and only after it had sought to increase the responsiveness of federal agencies to environmental concerns.

The modern federal regulatory infrastructure to protect the environment was erected by Congress in a series of laws enacted during the 1970s. To consolidate responsibility for environmental protection programs, President Nixon created a specialized environmental agency, the Environmental Protection Agency, by executive order in 1970. Congress then charged the new agency with implementing the national regulatory legislation that followed.

During the 1970s alone, more than twenty major federal environmental laws were enacted or substantially amended, giving EPA and other federal agencies enormous regulatory responsibilities. In December 1970, Congress adopted the modern-day version of the Clean Air Act,⁸⁶ and in October 1972, it passed the Federal Water Pollution Control Act,⁸⁷ which has become known as the Clean Water Act.

82. Pub. L. No. 95-95, 91 Stat. 685 (1977) (codified as amended at 42 U.S.C. §§ 7401-7642 (1988 & Supp. V 1993)).

83. Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§ 1251-1376 (1988 & Supp. V 1993)).

84. Pub. L. No. 93-523, 88 Stat. 1660 (1974) (codified as amended at 42 U.S.C. §§ 330f-300j (1988 & Supp. V 1993)).

85. Pub. L. No. 94-580, 90 Stat. 2796 (1976) (codified as amended at 42 U.S.C. §§ 6901-6987 (1988 & Supp. V 1993)).

86. Pub. L. No. 91-604, 84 Stat. 1705 (1970) (codified as amended at 42 U.S.C. §§ 7401-7642 (1988 & Supp. V 1993)).

87. Pub. L. No. 92-500, 86 Stat. 896 (1972) (codified as amended at 33 U.S.C. §§ 1251-1376 (1988 & Supp. V 1993)).

These statutes transformed what had been relatively modest federal research and financial assistance programs into comprehensive, national regulatory programs to control air and water pollution. The Clean Air Act directed EPA to identify air pollutants that threatened public health or welfare and to establish minimum, national ambient air quality standards to be attained by the states. The Clean Water Act banned all unpermitted discharges of pollutants into surface waters and it imposed technology-based effluent limits to be implemented through a breathtakingly ambitious national permit program.

These laws established minimum, national regulatory standards to be attained throughout the United States. While the Clean Air Act required EPA to establish national ambient air quality standards (NAAQS), it gave states considerable flexibility in determining how to achieve these standards through the state implementation plan (SIP) process. As one court noted, under the Clean Air Act "state and local governments retain responsibility for the basic design and implementation of air pollution control strategies, subject to approval and, if necessary, enforcement by the Administrator."⁸⁸ Congress recognized that a high level of state involvement was a practical necessity for effective implementation of the Clean Air Act, as John Dwyer notes.⁸⁹ But it also was skeptical of state autonomy concerns due to the dismal failure of its efforts to encourage states to control pollution on their own. Claims that federal regulation interfered with state sovereignty were rejected in court on the ground that the Clean Air Act represented "a valid adaption of federalist principles to the need for increased federal involvement."⁹⁰ Federal efforts to force states to attain the NAAQS have generated substantial state resistance as discussed at length by John Dwyer.⁹¹

The Clean Air Act also authorized citizen suits against government agencies and polluters who violated the Act to help ensure that the law would be implemented and enforced. The citizen suit provision contained in the 1970 Clean Air Act became the model for citizen suit provisions incorporated into most of the other federal environmental statutes enacted during the 1970s. Yet, citizen suits against violators of the environmental laws did not become common until the implementation of the Clean Water Act's national permit system.

88. *Pennsylvania v. EPA*, 500 F.2d 246, 262 (3d Cir. 1974).

89. Dwyer, *supra* note 15, at 1190.

90. *Pennsylvania v. EPA*, 500 F.2d at 262.

91. Dwyer, *supra* note 15, at 1196-1216.

A major innovation in the 1972 Federal Water Pollution Control Act was the establishment of a national permit program (the national pollutant discharge elimination system, or NPDES) to control water pollution. This provided a regulatory infrastructure for controlling water pollution through technology-based effluent standards. By imposing industry-wide, nationally uniform minimum standards, Congress sought to prevent states from competing for industry by relaxing pollution control standards. To preserve state autonomy, Congress provided that states could operate the federal permit program through delegated authority from EPA.⁹²

While the first federal regulatory statutes focused on control of air and water pollution, Congress soon enacted additional regulatory statutes to protect public health against exposure to toxic substances. In 1974, Congress enacted the Safe Drinking Water Act (SDWA),⁹³ and in 1976, it enacted both the Resource Conservation and Recovery Act (RCRA)⁹⁴ and the Toxic Substances Control Act (TSCA).⁹⁵ The Safe Drinking Water Act requires EPA to establish national regulations to limit dangers to public health from contaminants in public water supplies. Because local governments typically own and operate public water supplies, the primary regulatory targets of this law are not private parties but rather entities of local government. This has generated substantial federalism concerns as local governments argue that they cannot afford to install the technology necessary to meet federal standards.⁹⁶

RCRA required EPA to establish minimum national standards governing management of hazardous waste from "cradle to grave," including a permit program for facilities that treat, store, or dispose of hazardous waste. Like the Clean Water Act, RCRA authorizes states to

92. In his article in this Symposium, David Hodas explores the implications for federalism concerns of the Clean Water Act's scheme of sharing enforcement authority between federal and state officials and citizen groups. See Hodas, *supra* note 24.

93. Pub. L. No. 93-523, 88 Stat. 1660 (1974) (codified as amended at 42 U.S.C. §§ 300f-300j (1988 & Supp. V 1993)).

94. Pub. L. No. 94-580, 90 Stat. 2796 (codified as amended at 42 U.S.C. §§ 6901-6987 (1988 & Supp. V 1993)).

95. Pub. L. No. 94-469, 90 Stat. 2051 (1976) (codified as amended at 42 U.S.C. §§ 2601-2629 (1988 & Supp. V 1993)).

96. Claims that local governmental entities cannot afford to comply with environmental standards are hardly new. When raised as a defense in a public nuisance action in 1858, a British court responded to this argument by telling local authorities: "If they have not funds enough to make further experiments, they must apply to Parliament for power to raise more money. If, after all possible experiments, they cannot [dispose of their sewage] without invading the Plaintiff's rights, they must apply to Parliament for power to invade his rights." *Attorney General v. Birmingham Borough Council*, 70 Eng. Rep. 220, 225-26 (V.C. 1858).

operate the federal regulatory program under delegated authority from EPA. Perhaps because it authorizes potentially the most far-reaching regulatory controls, TSCA departs from this model of delegation. It authorizes EPA to regulate chemical substances that may present an unreasonable risk to health or the environment. In a rare departure from the pattern of avoiding federal preemption, TSCA provides that EPA's regulations may preempt inconsistent state standards. As explained in the Symposium article by former New Jersey Governor Jim Florio, while few chemicals have been regulated by EPA under TSCA, TSCA's preemption provision has generated considerable litigation, particularly when states seek to regulate how PCBs are disposed.⁹⁷

E. Extending and Refining Federal Regulatory Strategies: 1980-1990

Having established the federal regulatory infrastructure to protect the environment during the 1970s, Congress spent the next decade trying to strengthen it by enacting additional legislation. As the initial environmental laws were reauthorized by Congress, the environmental protection strategies they employed were refined, extended, and strengthened. Efforts by the Reagan administration to relax environmental regulation fueled congressional adoption of more prescriptive environmental standards.

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),⁹⁸ enacted by Congress in 1980, represented a new approach to federal environmental legislation. Rather than creating a national regulatory program, Congress instead imposed a regime of strict liability for hazardous substance releases. CERCLA also created a program for remediating such releases that authorized the federal government to delegate cleanup decisions to the states. But, as Adam Babich notes, EPA refused for more than a decade to delegate cleanup decisions to states.⁹⁹ This turned the cooperative federalism model on its head because EPA often found itself administering state standards, which must be followed under CERCLA when "applicable" or "relevant and appropriate."¹⁰⁰

Much of the federal environmental legislation enacted during the 1980s tried to force EPA to implement the environmental laws in a more expeditious fashion. Faced with an executive branch less sympathetic to environmental concerns, Congress imposed new statutory

97. See Florio, *supra* note 19.

98. 42 U.S.C. §§ 9601-9675 (1988 & Supp. V 1993).

99. See Babich, *supra* note 23, at 1534-1535.

100. 42 U.S.C. § 9621(d)(1).

deadlines for EPA action and established specific sanctions if deadlines were not met. For example, the Hazardous and Solid Waste Amendments of 1984 (HSWA) provided that all land disposal of hazardous waste would be banned by certain dates unless a specific determination was made that certain levels of treatment were sufficient to avoid future environmental problems. As these laws required EPA to act more aggressively, they also increased the burden on state and local governments to make regulatory changes to comply with changing federal standards. Indeed, as Adam Babich explains, Congress made it virtually impossible for states to achieve full primacy in RCRA implementation by providing that regulations implementing HSWA requirements must take effect on the same date in every state and that EPA must implement new requirements directly pending its approval of state regulatory changes.¹⁰¹

Congress tried to be more sensitive to federalism concerns when it sought to craft a solution to the problem of siting low-level radioactive waste disposal facilities. In 1980 Congress enacted the Low-Level Radioactive Waste Policy Act,¹⁰² which authorized states to enter into interstate compacts to form regional disposal facilities and to exclude shipments of radioactive waste from states not participating in such agreements.¹⁰³ When it amended the Act in 1985¹⁰⁴ to provide incentives and penalties to encourage states to enter into such compacts, Congress based the legislation largely on a proposal crafted by the National Governors Association. Ironically, a portion of this legislation subsequently was invalidated by the Supreme Court because of federalism concerns, as discussed below.¹⁰⁵

In recent environmental legislation, Congress has also sought to promote more innovative forms of regulation, including informational disclosure requirements, such as those embodied in the Emergency Planning and Community Right-to-Know Act of 1986¹⁰⁶ and the

101. Babich, *supra* note 23, at 1534. Babich also explains how Congress has sought to resolve the battle between state and federal authorities over responsibility for CERCLA cleanup decisions. *Id.* at 1535-1536 n.75.

102. Pub. L. No. 96-573, 94 Stat. 3347 (1980) (amended 1986).

103. As Dan Tarlock notes, interstate compacts generally have not achieved their early promise as a means for overcoming jurisdictional barriers to effective management of regional resources. Tarlock, *supra* note 18, at 1331.

104. Low-Level Radioactive Waste Policy Act Amendments of 1985, Pub. L. No. 99-240, 99 Stat. 1842 (codified as amended at 42 U.S.C. §§ 2021-2021j (1988 & Supp. V 1993)).

105. See *infra* text accompanying notes 111-118.

106. See 42 U.S.C. §§ 11001-11050 (1988). The Emergency Planning and Community Right-to-Know Act creates a national inventory of toxic releases that is supplemented every year and made available to the public. Citizens can use this inventory to determine the quantities of hundreds of toxic chemicals that are released in their neighborhoods and the

marketable emissions allowances authorized by the Clean Air Act Amendments of 1990.¹⁰⁷ As Peter Menell explains, a variety of market-based approaches to promote environmental protection also are being pursued by state and local authorities.¹⁰⁸ These innovations are designed to make federal regulation more efficient and to reduce some of the breathtaking complexity of the regulatory infrastructure created by Congress. This complexity has contributed to the difficulties state authorities face as they struggle to implement federal regulatory programs.¹⁰⁹

F. Regulatory Recoil and Limits on Federal Power: 1991-Present

While federal environmental regulation has generated some remarkable progress in controlling major sources of pollution, it now faces a fierce political backlash in Congress. As Dan Tarlock notes, efforts to reform natural resource management policies also face stiff resistance from state and local interests particularly in western states.¹¹⁰ At the same time, the Supreme Court is rethinking basic principles of federalism, which ultimately could limit federal authority to protect the environment.

1. *New York v. United States*.—The Supreme Court's most recent articulation of constitutional limits on federal environmental regulation came in *New York v. United States*.¹¹¹ The Court struck down a provision of the Low-Level Radioactive Waste Policy Act which mandated that states take title to such waste generated within their borders if they fail to make arrangements for access to a disposal site by a

identities of the companies that release them. This has increased the pressure on companies to reduce their emissions voluntarily.

107. Pub. L. No. 101-549, 104 Stat. 2399 (codified as amended at 42 U.S.C. §§ 7401-7642 (1988 & Supp. V 1993)). The 1990 Clean Air Act Amendments essentially create marketable permits for companies who need to reduce their emissions of sulphur dioxide or nitrogen oxides. The law establishes an overall cap on levels of those emissions. To encourage emissions reductions to be made in the most efficient manner possible, companies are permitted to buy and sell emissions allowances. The allowances are selling at prices far below previous forecasts in a market that has not been terribly active. Matthew L. Wald, *Acid-Rain Pollution Credits Are Not Enticing Utilities*, N.Y. TIMES, June 5, 1995, at A11.

108. Menell, *supra* note 21, at 1470.

109. In a study reviewing intergovernmental decision-making for environmental protection and public works, the United States Advisory Commission on Intergovernmental Relations concluded in 1992 that "federal rules and procedures governing decision-making for protecting the environment often are complex, conflicting, difficult to apply, adversarial, costly, inflexible and uncertain." U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, INTERGOVERNMENTAL DECISIONMAKING FOR ENVIRONMENTAL PROTECTION AND PUBLIC WORKS 1 (1992).

110. Tarlock, *supra* note 18, at 1337-38 nn.114-115.

111. 112 S. Ct. 2408 (1992).

certain date. In an opinion by Justice O'Connor, the Court articulated ground rules for the exercise of federal authority to engage states in the kind of regulatory partnerships so prevalent in environmental law. Citing *Hodel v. Virginia Surface Mining & Reclamation Ass'n*,¹¹² Justice O'Connor stated that "Congress may not simply 'commandeer the states' legislative processes by directly compelling them to enact and enforce a federal regulatory program.'"¹¹³

Justice O'Connor outlined alternative means by which Congress can encourage states to implement federal programs. Under its spending power Congress can attach conditions on the receipt of federal funds if the conditions "bear some relationship to the purposes of the federal spending."¹¹⁴ Congress also can use its authority under the Commerce Clause to regulate private activity by offering "[the] States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation."¹¹⁵ These two models have been widely incorporated in the federal environmental laws. The constitutional flaw in the Low-Level Radioactive Waste Policy Act's "take title" provision¹¹⁶ is that it directly compelled states to regulate, which Justice O'Connor found would diminish the accountability of both state and federal officials by insulating the ultimate regulators from accountability to the electorate.

Justice White, joined by two other justices in dissent, argued that it was ironic that the Court "in its rigid obeisance to 'federalism,'" actually gave "Congress fewer incentives to defer to the wishes of state officials in achieving local solutions to local problems."¹¹⁷ Describing the Low-Level Radioactive Waste Policy Act as "a classic example of Congress acting as arbiter among the States in their attempts to accept responsibility for managing a problem of grave import," Justice White charged that "the Court upsets the delicate compromise achieved among the States and forces Congress to erect several additional formalistic hurdles to clear before achieving exactly the same objective."¹¹⁸

Justice White is undoubtedly correct that *New York v. United States* will not pose a significant hurdle to the ability of Congress to find constitutional means to pursue its goals. But the decision is important

112. 452 U.S. 264, 288 (1981).

113. *New York v. United States*, 112 S. Ct. at 2425 (quoting *Hodel*, 452 U.S. at 288).

114. *Id.* at 2425.

115. *Id.* at 2427.

116. See 42 U.S.C. § 2021e(d)(2)(C).

117. *New York v. United States*, 112 S. Ct. at 2446 (White, J., dissenting).

118. *Id.*

because it signaled a greater willingness on the part of the Court to assert judicially enforceable limits on federal authority, presaging the Court's subsequent decision in *Lopez v. United States*.¹¹⁹ From the standpoint of environmental federalism, more significant than *New York v. United States* is the subsequent election of a Congress committed to relaxing environmental regulation and returning power to the states.

2. *The "Contract with America" and Unfunded Mandates Legislation.*—The legislative climate that long supported federal environmental regulation had begun to change even before the Republican takeover of the 104th Congress. Efforts to reauthorize some of the major federal environmental statutes and to reform laws governing resource management on public lands failed in both the 102nd and 103rd Congresses. Due to the Republican victory in the 1994 congressional elections, sweeping changes may occur in the environmental laws. Unfunded mandates legislation already has been signed into law.¹²⁰ A bill that would dramatically relax the Clean Water Act has been passed by the House of Representatives. The "Contract with America" being advanced by the Republican leadership in the House includes other measures that could drastically alter federal environmental law, including a regulatory moratorium, "super mandates" for risk assessment and cost-benefit analysis, and requirements that the government compensate landowners when regulation adversely affects property values.

The unfunded mandates legislation enacted by Congress is the product of lobbying by state and local officials who had become increasingly alarmed about the cost of implementing federal requirements that are not accompanied by federal funding. Efforts to comply with the Safe Drinking Water Act have been particularly costly for municipalities. In an effort to defuse these concerns, President Clinton issued Executive Order 12,875 in October 1993.¹²¹ The executive order prohibits federal agencies from issuing regulations that impose unfunded mandates not required by statute unless the agency informs the Office of Management and Budget of its efforts to consult with state and local governments and its justification for the mandates. It also directs federal agencies to process applications for regulatory waivers from state and local governments within 120 days to the extent permitted by law.

119. 115 S. Ct. 1624 (1995); see *infra* text accompanying notes 123-137.

120. Unfunded Mandates Reform Act, Pub. L. No. 104-4, 109 Stat. 48 (1995).

121. 58 Fed. Reg. 58,093 (1993).

In March 1995, Congress overwhelmingly approved legislation making it more difficult to impose federal mandates on state and local governments. The legislation, known as the Unfunded Mandate Reform Act of 1995, requires that more detailed cost estimates be provided for federal mandates and makes it easier for opponents of such provisions to defeat them in Congress. The law requires the Congressional Budget Office (CBO) to provide estimates of the future cost of legislative mandates if they may exceed \$50 million annually for state or local governments or the private sector. Any member of Congress can raise a point of order demanding that unfunded mandates estimated to cost state or local governments more than \$50 million annually be stricken from legislation unless specifically approved by a majority vote. Mandates for which future federal funding is promised are to expire if the funding is not subsequently provided.

The legislation also imposes new requirements on agencies issuing regulations that impose federal mandates. The law requires that federal agencies, prior to publishing a notice of proposed rule-making, prepare assessments of the anticipated costs and benefits of any mandate that may cost state or local governments or the private sector more \$100 million annually. It also prohibits federal agencies from issuing regulations which contain federal mandates that do not employ the least costly method or that do not have the least burdensome effect on governments or the private sector unless the agency publishes an explanation of why the more costly or burdensome method was adopted. These provisions are subject to judicial review if the underlying agency action is already reviewable in court.

Congress exempted from the unfunded mandates legislation laws that protect civil or constitutional rights as well as measures necessary to national security or to implement international treaty obligations. Amendments to exempt radioactive waste regulations or to prevent relaxation of rules that would put private business at a disadvantage with competing governmental entities were defeated.

The unfunded mandates legislation does nothing to repeal any existing federal mandates. House Speaker Newt Gingrich has vowed to set aside one day each month, dubbed "Corrections Day," for the House to consider repeal of such provisions on an individual basis. One reporter noted that "'Corrections Day' could prove to be a lobbyist's dream by opening the door to special interest legislation designed to circumvent federal regulations."¹²²

122. David Rogers, *House Approves Bill Aimed at Curbing State Mandates*, WALL ST. J., Feb. 2, 1995, at A20.

3. *United States v. Lopez and Environmental Regulation*.—In April 1995, the Supreme Court issued a surprising decision that may presage more significant limits on federal regulatory authority. For the first time in nearly sixty years, the Court overturned a federal law on the grounds that it exceeded Congress's authority under the Commerce Clause. In *United States v. Lopez*,¹²³ the Court held, by a bare five-to-four majority, that Congress does not have the authority under the Commerce Clause to prohibit the possession of firearms in the vicinity of schools.

The *Lopez* Court confirmed that Congress has the authority to regulate three broad classes of activities under the Commerce Clause. These include "the use of the channels of interstate commerce" and intrastate activities that threaten "the instrumentalities of interstate commerce, or persons or things in interstate commerce."¹²⁴ The third class of activities that may be subject to federal regulation are "activities having a substantial relation to interstate commerce."¹²⁵ Noting that it previously had been unclear how substantial this relationship must be, the Court announced that the "proper test" is "whether the regulated activity 'substantially affects' interstate commerce."¹²⁶

While it is unclear to what extent the *Lopez* "substantially affects" test will impose new restrictions on federal regulatory authority, Chief Justice Rehnquist's majority opinion suggests that Congress will have little problem regulating economic or commercial activity. He emphasized that the Gun-Free School Zones Act had "nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."¹²⁷ Citing with approval *Hodel v. Virginia Surface Mining & Reclamation Ass'n*,¹²⁸ which upheld federal regulation of intrastate coal mining under the Surface Mining Control and Reclamation Act, the Chief Justice stated that "[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."¹²⁹ Significantly, the Chief Justice did not question the validity of even *Wickard v. Filburn*,¹³⁰ which he described as "the most far reaching example of Commerce Clause authority over intrastate activity," because it "involved economic activity in a way that

123. 115 S. Ct. at 1624.

124. *Id.* at 1629.

125. *Id.* at 1629-30.

126. *Id.* at 1630.

127. *Id.* at 1630-31.

128. 452 U.S. 264 (1981).

129. *Lopez*, 115 S. Ct. at 1630.

130. 317 U.S. 111 (1942).

the possession of a gun in a school zone does not."¹³¹ In *Wickard* the Court upheld federal regulation of the production and consumption of home grown wheat because of its effect on the price and market for wheat sold in interstate commerce. If *Wickard* remains good law, then *Lopez* apparently will not significantly restrict federal authority to regulate virtually any commercial activity.

The more difficult questions include what impact the *Lopez* decision will have on federal authority to regulate noncommercial activity and how courts can distinguish between commercial and noncommercial activity. Can actions that cause environmental harm be subject to federal regulation if they are not the product of commercial activities? Is the impact of environmental harm on interstate commerce a sufficient basis for assertion of federal regulatory authority over noncommercial activities? Can the federal government regulate land use that causes environmental damage if it is not deemed related to commercial activity? Justice Breyer and three other dissenting justices argue that it will be difficult, if not impossible, to find a principled means for distinguishing commercial from noncommercial conduct.¹³² While the Chief Justice acknowledged the difficulty of determining "whether an intrastate activity is commercial or noncommercial,"¹³³ he concluded that such "legal uncertainty" was a necessary price to pay to ensure that Congress's enumerated powers have "judicially enforceable outer limits."¹³⁴ In a concurring opinion, Justice Kennedy proposed to address such uncertainty by inquiring as to "whether the exercise of national power seeks to intrude upon an area of traditional state concern."¹³⁵ However, environmental law is replete with instances where matters traditionally viewed as local concerns eventually have been subjected to national regulation because of the failure of state or local authorities to address burgeoning environmental problems.

The Court also noted that the statute invalidated in *Lopez* contained "no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce."¹³⁶ This would appear to distinguish *Lopez* from cases arising under the Clean Water Act, whose jurisdiction extends to

131. *Lopez*, 115 S. Ct. at 1630.

132. *Id.* at 1663 (Breyer, J., dissenting).

133. *Id.* at 1633.

134. *Id.*

135. *Id.* at 1634 (Kennedy, J., concurring).

136. *Id.* at 1631.

"waters of the United States,"¹³⁷ defined as waters whose use or misuse could affect interstate commerce.¹³⁸ However, it is possible that the Court's articulation of a "substantially affects" test in *Lopez* may restrict the jurisdictional breadth of the Act by requiring demonstrations of more substantial effects on commerce before activities can be regulated under the Act.

Because of the uncertainty it creates, *Lopez* undoubtedly will generate new challenges to federal regulation. However, there are early indications that its impact may be largely symbolic. Five days after deciding *Lopez*, the Court unanimously reversed a Ninth Circuit decision that had restricted the reach of federal anti-racketeering legislation on Commerce Clause grounds.¹³⁹ Moreover, Justices Kennedy and O'Connor, two of the five justices in the *Lopez* majority, cautioned that the Court should exercise "great restraint" before determining that Congress has exceeded its authority.¹⁴⁰ Noting the economic transformation that has occurred during the last two centuries, Justice Kennedy concluded that "Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy."¹⁴¹

III. CONTEMPORARY MODELS OF ENVIRONMENTAL FEDERALISM

Several factors have contributed to the federalization of environmental regulation and many rationales have been employed to justify it. First, federal law has been the most effective means for overcoming "stubborn local particularism"¹⁴² and promoting environmental protection,¹⁴³ particularly when dealing with transboundary pollution,¹⁴⁴ as states recognized initially when they invoked federal common law to seek redress against it. Congress also has sought to use federal regulation to guarantee a minimum level of environmental protection to citizens regardless of their place of residence. In a nation with high

137. 33 U.S.C. § 1362(7).

138. See *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

139. *United States v. Robertson*, 115 S. Ct. 1732 (1995) (per curiam).

140. *Lopez*, 115 S. Ct. at 1634 (Kennedy, J., concurring).

141. *Id.* at 1637.

142. See Carol M. Rose, *The Ancient Constitution vs. The Federalist Empire: Anti-Federalism from the Attack on "Monarchism" to Modern Localism*, 84 Nw. U. L. Rev. 74, 99 (1989).

143. As Dan Tarlock notes in this Symposium, because the jurisdictional boundaries of state and local governments do not coincide well with the boundaries of ecosystems, policies to preserve biodiversity by protecting habitat may be best implemented at the federal level. See Tarlock, *supra* note 18.

144. See Dwyer, *supra* note 15, at 1220.

population mobility,¹⁴⁵ federal minimum standards help guarantee that citizens can travel freely without encountering unreasonable risks to their health or welfare from environmental conditions.¹⁴⁶ While the "race-to-the-bottom" rationale for federal regulation has been criticized on theoretical grounds,¹⁴⁷ it is still widely believed that federal standards can help states resist industry pressures to relax regulatory standards.¹⁴⁸ In some circumstances, industries prefer nationally uniform regulations to avoid having to comply with balkanized regulatory standards.¹⁴⁹ In an economy that is becoming increasingly global in scope, there also are substantial economies of scale in having regulatory standards established at the national level.¹⁵⁰

Despite the growth of federal environmental law, Congress has gone to great lengths to preserve an important role for the states in environmental policy-making. State law retains considerable importance in the environmental protection arena. Congress generally has been careful not to preempt state law except in narrow circumstances. State common law retains considerable vitality for addressing damage caused by pollution. Some of the most innovative environmental protection legislation has been the product of state initiatives, including California's Proposition 65,¹⁵¹ New Jersey's Environmental Cleanup

145. More than 21 million Americans moved from one state to another between 1985 and 1990. In 1990 less than 62% of the U.S. population resided in the state in which they were born. JOHN J. DI IULIO, JR. & DONALD F. KETTLE, *FINE PRINT: THE CONTRACT WITH AMERICA, DEVOLUTION, AND THE ADMINISTRATIVE REALITIES OF AMERICAN FEDERALISM* 6 (1995).

146. Although the federal environmental laws generally set minimum, rather than maximum standards, Jim Krier's criticism of the federal government's pursuit of uniformity would have more force if the federal floors are routinely set too high. See Krier, *supra* note 16. Jerry Organ's observation that many states have converted federal floors into ceilings may confirm either that federal standards are "too high" or that forces generating the proverbial "race-to-the-bottom" are particularly intense. Organ, *supra* note 20, at 1392-93.

147. See Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992).

148. For examples of the intense pressure faced by states to grant concessions to industry to prevent relocation in other states, see Fred R. Bleakley, *Many Firms Press States for Concessions*, WALL ST. J., Mar. 8, 1995, at A2.

149. See Bruce A. Ackerman et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J. L. ECON. & ORG. 313 (1985).

150. See, e.g., Justice Rehnquist's discussion in *Mikwaukee II*, of the technical complexities of water pollution control and Congress's desire to overcome the "sporadic" and "ad hoc" nature of prior efforts at water pollution control. *City of Milwaukee v. Illinois*, 451 U.S. 305, 325 (1981); see also Dwyer, *supra* note 15, at 1220.

151. California Initiative Measure of Nov. 4, 1986 (Proposition 65) (codified at CAL. HEALTH & SAFETY CODE § 25249.1 to .12 (West 1994)).

and Responsibility Act,¹⁵² and Michigan's Environmental Protection Act (MEPA).¹⁵³

As the articles in this Symposium demonstrate, federal-state relations have evolved into increasingly complex arrangements over the years. While the federal environmental laws reflect this complexity, they display certain common patterns. Three general approaches to environmental federalism can be identified. The first model used by the federal government was to provide financial or regulatory incentives to encourage states to adopt environmental standards on their own. While this approach proved to be largely ineffective at controlling air and water pollution, it is still the principal federal approach to issues such as land-use regulation where political sensitivity to federal regulation is particularly high. Federal law encourages state and local land-use and solid waste management planning under the Coastal Zone Management Act, the Clean Water Act, and Subtitle D of the Resource Conservation and Recovery Act.

By conditioning the receipt of federal funds on state adoption of plans acceptable to federal authorities, this approach can stimulate greater state efforts to address environmental problems. This model is consistent with constitutional principles of federalism outlined in *New York v. United States*, where the Court expressly approved Congress's use of its spending power to encourage states to implement

152. New Jersey's Environmental Cleanup Responsibility Act (ECRA) took effect on December 31, 1984. ECRA requires that an environmental assessment be made when industrial property is being sold and that a cleanup plan be implemented if the property is found to be contaminated. The Act requires that the seller of property transfer to the buyer either a "negative declaration" approved by state environmental authorities, which declares either that no hazardous substances have been released on the site or that any discharge has been cleaned up, or an approved cleanup plan for the site accompanied by financial assurances that the plan will be implemented. If a seller fails to comply with ECRA, the buyer may void the transaction and the seller is strictly liable for response costs and damages for failure to implement the cleanup. Act of Sept. 2, 1983, ch. 330, 1983 N.J. Laws (codified at N.J. STAT. ANN. § 13:1K-6 to -35 (West 1992)).

153. Enacted in 1970, MEPA explicitly encourages the development of a state common law of environmental protection by authorizing "any person" to sue for declaratory and equitable relief "for the protection of the air, water, and other natural resources and the public trust therein from pollution, impairment or destruction." MICH. COMP. LAWS ANN. § 324.1701 (1994). Suits may be brought against the state, its agencies, corporations, individuals or other private entities. MEPA provides that if a plaintiff makes a prima facie showing that a defendant has or is likely to "pollute, impair or destroy the air, water or other natural resources," the defendant must either rebut this showing or demonstrate as an affirmative defense that there is "no feasible and prudent alternative to the defendant's conduct and that such conduct is consistent with the promotion of the public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources." *Id.* § 324.1703.

federal programs.¹⁵⁴ The power of this approach as a tool for motivating states to act depends in large part on the amount of federal financial assistance involved. As federal grants to assist state environmental programs have declined, this approach has become a far less significant tool to promote state action. Moreover, it does not use federal regulatory authority to ensure that certain levels of environmental protection are achieved. The two other models of environmental federalism feature much more aggressive federal regulatory roles.

The predominant approach to environmental federalism currently employed by federal environmental statutes is a "cooperative federalism" model. The principal federal pollution control statutes make federal agencies responsible for establishing national environmental standards that state authorities then may qualify to administer and enforce. The Clean Air Act, the Clean Water Act, RCRA, and the Safe Drinking Water Act all require EPA to establish minimum national standards that can be implemented and administered by states subject to federal supervision. These statutes generally permit federal authority to be delegated to state officials once they demonstrate that they are capable of operating the programs in a manner that meets minimum federal requirements. In states that choose not to apply for program delegation, the federal programs are operated and enforced by federal authorities. Again, this is consistent with constitutional principles of federalism approved by the Supreme Court in *New York v. United States* because it offers states a choice of regulating an activity "according to federal standards or having state law pre-empted by federal regulation."¹⁵⁵

The cooperative federalism model seeks to exploit economies of scale by establishing national environmental standards while leaving their attainment to state authorities subject to federal oversight. As John Dwyer notes in this Symposium, this approach is a practical necessity because "the federal government cannot implement its air pollution program without the substantial resources, expertise, information, and political support of state and local officials."¹⁵⁶ States are more likely to seek delegation when it is coupled with federal financial assistance. Oliver Houck and Michael Rolland note that this explains why nearly forty states operate delegated National Pollutant Discharge Elimination System permit programs under the Clean Water Act, while only two have delegated authority to implement sec-

154. *New York v. United States*, 112 S. Ct. 2408, 2423 (1992).

155. *Id.* at 2424.

156. Dwyer, *supra* note 15, at 1224.

tion 404 programs.¹⁵⁷ By encouraging the states to develop their own bureaucracies to administer environmental programs, Dwyer notes that cooperative federalism "paradoxically gives states greater opportunity and incentives to undertake policy experimentation."¹⁵⁸ Considerable state autonomy is preserved because most federal environmental standards established under this model are minimum standards with states expressly authorized to establish more stringent controls if they so desire.¹⁵⁹

A major problem with the cooperative federalism approach is that it is difficult to ensure that states devote sufficient resources to administer and enforce federal programs, particularly as state budgets shrink and federal regulatory programs grow in size and complexity. While the federal government increasingly has delegated responsibility for the operation of environmental programs to the states, federal financial assistance for administering these programs has been reduced sharply and most states have failed to replace lost federal funds for environmental programs with funds of their own.¹⁶⁰ Thus, the resources devoted to state environmental programs and the quality of their operation varies dramatically from state to state. While EPA has the authority to withdraw a delegation of program authority to any state that is not meeting federal standards, this sanction is too blunt an instrument to be very effective. States understand that EPA has little incentive to assume programs that would add to the agency's own responsibilities at a time when it is having difficulty finding funds to implement its existing programs.¹⁶¹ As the burden of environmental expenditures increasingly falls on financially-strapped state and local governments,¹⁶² the quality of state administration of federal programs has become even more variable.

157. Houck and Rolland also note the significance of some hybrid delegation arrangements where only certain portions of a § 404 program are delegated to the states to operate or where states can obtain partial delegation to administer state programmatic general permits under § 404(e) of the Clean Water Act. See Houck & Rolland, *supra* note 17, at 1266-87.

158. Dwyer, *supra* note 15, at 1224.

159. For example, § 510 of the Clean Water Act specifies that states may adopt and enforce more stringent limits on discharges than required by the federal government.

160. James P. Lester, *A New Federalism? Environmental Policy in the States*, in ENVIRONMENTAL POLICY IN THE 1990s 67 (Norman J. Vig & Michael E. Kraft eds., 1990).

161. Federal oversight also can take the form of vetoing state permit decisions under the Clean Water Act. As Houck and Rolland note, this approach has the advantage of creating multiple decision points that work to the advantage of environmental interests. See Houck & Rolland, *supra* note 17, at 1252-53.

162. See U.S. ENVTL. PROTECTION AGENCY, A PRELIMINARY ANALYSIS OF THE PUBLIC COSTS OF ENVIRONMENTAL PROTECTION: 1981-2000 (1990).

A third approach to environmental federalism eschews state administration of federal standards in favor of federal control. Preemption of state law has been employed sparingly in federal environmental laws. It usually is reserved for regulation of products that are distributed nationally. Examples include regulation of chemicals under the Toxic Substances Control Act (TSCA),¹⁶³ pesticide registration under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA),¹⁶⁴ and provisions of the Clean Air Act that govern vehicle emissions. Under these programs, federal regulation can preempt inconsistent state standards.

In other cases, the federal government has retained exclusive permitting authority, as in the most significant class of section 404 permits and in the licensing of hydroelectric facilities by the Federal Energy Regulatory Commission. However, states retain an important role in influencing the terms of these permits through the certification requirements of the Coastal Zone Management Act¹⁶⁵ and section 401 of the Clean Water Act.¹⁶⁶ The significance of these requirements was underscored by the Supreme Court's decision in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*,¹⁶⁷ where the Court held that states could impose minimum water flow requirements to ensure compliance with state water quality standards as a condition for obtaining a federal permit for a hydroelectric project.

Issues of preemption have arisen in toxic tort litigation and in response to state regulatory initiatives that allegedly interfere with federal programs. Courts interpreting federal pollution control statutes have been reluctant to infer federal preemption in the absence of clearly expressed congressional intent to preempt.¹⁶⁸ In some cases

163. Pub. L. No. 94-649, 90 Stat. 2003 (1976) (codified as amended at 15 U.S.C. §§ 2601-2671 (1988 & Supp. V 1993)).

164. Pub. L. No. 92-512, 86 Stat. 973 (1972) (codified as amended at 7 U.S.C. §§ 136-136y (1988 & Supp. V 1993)).

165. 16 U.S.C. §§ 1451-1464 (1988 & Supp. V 1993).

166. 33 U.S.C. § 1341.

167. 114 S. Ct. 1900 (1994).

168. See, e.g., *Cippollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992) (holding that Federal Cigarette Labeling and Advertising Act only preempts claims based on a failure to warn and the neutralization of federally mandated warnings but not for claims based on express warranty, intentional fraud and misrepresentation or conspiracy); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984) (holding that award of punitive damages under state law for exposure to nuclear material not preempted by the Atomic Energy Act); *Pacific Gas & Elec. v. California Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983) (upholding California state initiative that blocked the licensing of new nuclear powerplants in the state pending the development of a facility for disposal of high-level nuclear waste on ground that it is an economic measure rather than a safety regulation in

where courts have found state regulations to be preempted, Congress has acted to remove the preemptive impact of federal regulation. For example, in 1986 the Supreme Court held that the Comprehensive Environmental Response, Compensation and Liability Act, the federal "superfund" legislation, preempted the use of state "superfunds" to fund the cleanup of hazardous substance releases covered by the federal legislation.¹⁶⁹ This holding was a narrow one because the Court indicated that states could use such funds to pay their required contributions to federal cleanups. Nevertheless, Congress promptly amended CERCLA in 1986 to clarify that states could require companies to contribute to state funds even if they were used for activities covered by the federal legislation. Even statutes, like FIFRA, that expressly prohibit states from imposing labeling or packaging requirements different from those imposed by federal regulation have not been interpreted to preempt other types of state or local regulation. In *Wisconsin Public Intervenor v. Mortier*,¹⁷⁰ the Supreme Court unanimously held that FIFRA did not preempt municipal ordinances that require that a permit be obtained before a pesticide is applied to certain private lands.

As national regulation expands in scope, the range of potential conflicts between federal and state environmental regulation may increase. One response to this problem has been to adopt a kind of hybrid approach to preemption that establishes conditions that must be satisfied before state or local governments can adopt regulations that go beyond minimum federal standards. For example, the Clean Air Act amendments now authorize states to adopt stricter auto emission standards than the federal minimum, but only if those standards conform to the stricter standard that California has been allowed to adopt. The rationale behind this provision is that it will increase state

conflict with the Atomic Energy Act); *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973) (holding that the Noise Control Act and the Federal Aviation Act preempt a local noise abatement ordinance that effectively barred jet aircraft from taking off at night); *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960) (upholding municipality's smoke abatement ordinance as applied to ships on the Great Lakes against claims that it interfered with interstate commerce and that it was preempted by federal safety regulation of seagoing vessels). But see *Gade v. National Solid Wastes Management Ass'n*, 112 S. Ct. 2374 (1992) (Occupational Safety and Health Act preempts state hazardous waste licensing in certain circumstances). Preemption may become even more difficult to infer in the future. The Unfunded Mandates Reform Act enacted in March 1995 provides that committee reports accompanying any bill or joint resolution should include an explicit statement on whether the bill or joint resolution, in whole or in part, is intended to preempt any state, local, or tribal law, and if so, an explanation of the reasons for such intention.

169. *Exxon Corp. v. Hunt*, 475 U.S. 355 (1986).

170. 501 U.S. 597 (1991).

flexibility to meet federal Clean Air Act standards while requiring vehicle manufacturers only to meet a standard with which they must already comply in the California market. This approach is designed to give states greater flexibility in tailoring standards to their environmental needs, while avoiding the creation of several different standards that would unduly increase costs to national manufacturers.

Aside from the problems that inconsistent state standards may cause national manufacturers, states generally have been given the freedom to adopt stricter environmental standards than the federal minimum on the assumption that the state would have to bear the costs of the more stringent regulation. When the cost of meeting stricter standards is borne largely by dischargers in other states, this theory does not apply, which may explain the Supreme Court's unwillingness to permit a downstream state to apply its own common law standards to water pollution originating in an upstream state with less stringent standards.¹⁷¹

IV. CONCLUSION

As the articles in the Symposium indicate, questions concerning how power, resources, and responsibility for environmental protection should be allocated among different levels of government have long been, and will likely remain, a fierce political battleground. But important lessons for environmental federalism can be learned from the long history of federal and state efforts to protect the environment, particularly the last quarter-century of experience with national regulatory programs. The articles in this Symposium suggest some general principles that should guide Congress and the courts as they struggle to address issues of environmental federalism.

First, effective environmental protection policy requires some form of cooperative federalism in which federal and state authorities work together to achieve national goals. As John Dwyer argues, the federal government simply does not have the capacity to regulate effectively without the cooperation of state and local governments. Conversely, history demonstrates that state and local officials generally are too vulnerable to local economic and political pressures favoring development to be given exclusive responsibility for environmental protection.¹⁷² As Oliver Houck and Michael Rolland argue, the

171. *See International Paper Co. v. Oulette*, 479 U.S. 481 (1987).

172. As Oliver Houck and Michael Rolland note, state and federal interests in wetlands protection differ markedly. States with the largest and most nationally important wetlands are those that are least inclined to protect them, particularly when the benefits they produce (such as the migratory waterfowl that breed in the Alaskan tundra and are enjoyed

choice is not an either/or choice between federal or state authorities, but rather a question of how both levels of government best can work together.¹⁷³

When designing such cooperative arrangements, the focus should be on what works best in promoting national interests in environmental protection in a manner that is sensitive to state sovereignty. Reconciling these interests can be an immense political challenge. As Dan Tarlock and Oliver Houck and Michael Rolland note, the strong tradition of local control over land use and water allocation decisions has posed a major obstacle to federal efforts to preserve biodiversity and protect wetlands.¹⁷⁴ Yet, as John Dwyer demonstrates based on the history of the Clean Air Act, whenever the federal government has been forced to make judgments concerning local transportation or land-use policy to promote the achievement of national environmental standards, state and local resistance has made it a political disaster.¹⁷⁵ The increasing interdependence of world economies may generate greater political support for centralization and harmonization of environmental standards, as Cliona Kimber argues,¹⁷⁶ but resentment by lower levels of government to centralized control is likely to continue.¹⁷⁷ The articles in this Symposium indicate that there are no easy answers to the question of how best to promote national or regional goals while respecting state or local autonomy, but they indicate that there is a rich experience on which to draw to guide policymakers in making more potentially astute choices in the future.¹⁷⁸

Unfortunately, "what works best" has rarely been the guiding principle in determining allocations of authority between federal and state governments. Current efforts to reduce the size of government and to return greater power to the states have not been driven by any principled articulation of a methodology to determine which level of government is best suited to perform which functions.¹⁷⁹ Political factors have been more influential in generating the movement toward

mainly by citizens of the lower forty-eight states) flow to other states. Houck & Rolland, *supra* note 17, at 1252-53. Dan Tarlock notes that state and local resistance to environmental protection is even more intense when the intangible values served by preservation of biodiversity are at stake than when the public health effects of air and water pollution are at issue. Tarlock, *supra* note 18, at 1336.

173. Houck & Rolland, *supra* note 17, at 1244.

174. Tarlock, *supra* note 18, at 1341; Houck & Rolland, *supra* note 17, at 1251.

175. Dwyer, *supra* note 15, at 1206.

176. Kimber, *supra* note 25, at 1660.

177. *Id.* at 1661.

178. See, for example, the principles outlined in Babich, *supra* note 23, at 1534.

179. See DiIulio & Kettle, *supra* note 145, at 6. As Dan Tarlock notes in this Symposium, "Supreme Court federalism jurisprudence is an abstract and backward-looking doc-

devolution. As noted above, proponents of restricting federal regulatory authority are not always consistent advocates of devolution. Many of the conservative Republicans who support limiting federal environmental regulations are enthusiastic supporters of federalizing major aspects of products liability law, legislation vastly expanding federal criminal law, and laws preempting state restrictions on interstate banking.¹⁸⁰ Too frequently, federalism conflicts have been either the product of, or the catalyst for, political pressures simply to transfer problems elsewhere rather than to craft effective solutions to solve them. The current ferment over federalism creates particular risks that, rather than improving program performance, responsibilities will be shifted in a manner that makes problems less visible. Giving states greater responsibility for environmental protection does not guarantee better performance. Indeed, history counsels that it may be a prescription for lowering environmental standards and reducing enforcement effort. But history also demonstrates that efforts to achieve federal goals will be thwarted if they are pursued without sensitivity to state and local concerns.

A chronic barrier to achieving the goals of cooperative federalism at both the federal and state levels has been the gap between regulatory responsibilities and agency resources. In an era where chronic budget deficits make government budget cuts a priority, power will flow to wherever the resources are. While state and local governments complain about unfunded mandates, federal regulatory agencies also lack the resources to implement the ambitious mandates given them by Congress. Indeed, as Melinda Kassen notes, federal facilities often lack the resources to comply with the very laws these agencies are charged with implementing.¹⁸¹ In these circumstances, any effort to delegate greater responsibilities to the states that does not address the

trine that seeks an ideal diffusion of power without a clear articulation of the values sought to be advanced by this objective." Tarlock, *supra* note 18, at 1320.

180. This has led some observers to question whether arguments over federalism are largely outcome-oriented instead of based on larger philosophic concerns regarding the appropriate roles of various levels of government. Hunt, *supra* note 12, at A19. Recent Senate action on federal transportation legislation illustrates the conflict. In response to state concerns, the Senate voted to repeal existing federal financial penalties for states that do not require motorcyclists to wear helmets. However, the same bill included a provision to impose additional federal financial penalties on states that do not adopt new "zero tolerance" policies for drinking by drivers who are younger than the legal drinking age. Helen Dewar, *Senate Votes to Repeal Helmet Laws*, WASH. POST, June 22, 1995, at A1.

181. Kassen, *supra* note 22, at 1478.

question of funding can be assumed to be an effort to reduce the effectiveness of environmental regulation.¹⁸²

Because of their intensely political character, issues of environmental federalism ultimately will be decided by political processes. Yet the Supreme Court's recent effort to articulate constitutional limits on federal power may have important implications for national environmental protection policy. As the history of the Court's takings jurisprudence indicates, the *Lopez* decision may be more significant as a vehicle for deterring regulatory excesses than for actually presaging substantial reversals of assertions of federal authority. While the commercial/noncommercial distinction employed by the Court will not make it difficult to assert federal authority over business activities that cause environmental effects, federal regulation of individual actions, such as a private landowner filling a wetland, may become more difficult. Oliver Houck and Michael Rolland offer several powerful reasons why development of wetlands has significant impacts on interstate commerce.¹⁸³ These impacts may be cumulative and difficult to demonstrate at the micro-level, but so long as the Court still considers cumulative effects in assessing whether an activity has a substantial effect on interstate commerce, as it did in *Wickard v. Filburn*, there should be no jurisdictional difficulties for section 404.

What the Court may have done in *Lopez* is simply to require Congress to provide a more explicit articulation of the federal interest to be served by federal regulatory statutes. Because the federal environmental laws do serve to promote nationally important interests, as the articles in this Symposium show, this should not be difficult to demonstrate. Ultimately, this exercise may prove useful in promoting greater public support for federal regulation by clarifying the federal interests Congress seeks to vindicate. The new unfunded mandates legislation also may have a similar effect by making more explicit the implications of Congress's assertion of federal authority.

Consistency has not been the hallmark of federalism issues either in Congress or in the courts. As Professor Tarlock notes, from the perspective of federalism, some of the Supreme Court's recent takings jurisprudence becomes difficult to understand.¹⁸⁴ While the Court is purporting to vindicate the federally-guaranteed right of property owners to receive just compensation when the government takes their

182. See Houck and Rolland's proposal for tying greater devolution of jurisdictional authority to states, to state establishment of dedicated funding mechanisms for implementing that authority. Houck & Rolland, *supra* note 17, at 1313.

183. Houck & Rolland, *supra* note 17, at 1245-50.

184. Tarlock, *supra* note 18, at 1337-1340.

property, it is becoming far less deferential to state judgments concerning the potential harm caused by development.¹⁸⁵ In *Lucas v. South Carolina Coastal Council*,¹⁸⁶ the Court refused to accept the state's rationale that development in sensitive coastal areas threatened harm in the absence of more detailed findings. As Professor Tarlock notes, respect for federalism would counsel the Court to be more deferential to future state efforts to define property rights, which could permit states to integrate ecosystem support requirements into state property law in a manner relevant to federal takings analyses. For now, however, the Court continues to demand greater justifications for environmentally-based development conditions, as in *Dolan v. City of Tigard*,¹⁸⁷ in a return to the kind of common law approach that the Court itself eventually eschewed in interstate nuisance actions in favor of reliance on regulatory standards.

The history of environmental federalism demonstrates that notions of what constitutes traditional state and local responsibilities can change dramatically over time. The one constant has been political turmoil and change. This process may not be very efficient, but efficiency is not the primary value served by federalism. Political turmoil and change are both the causes and the necessary consequences of divided government and shared authority that are the essence of our federalism.

185. *Id.* at 1339-40.

186. 112 S. Ct. 2886 (1992).

187. 114 S. Ct. 2309 (1994).